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IN THE

Supreme Court of the United States

SHARON B. POLLARD,

Petitioner,

—v.—

E.I. DUPONT DE NEMOURS COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Society for Human Resource Management ("SHRM") is the leading voice of the human resource profession. SHRM provides education and information services, conferences and seminars, government and media representation, online services and publications to more than 150,000 professional and student members throughout the world. As the world's largest human resource management association, SHRM is a founding member of the North American Human Resource Management Association and a founding member and Secretariat of the World Federation of Personnel Management Associations.

As the major association of the human resources profession, SHRM and its members are vitally concerned with the orderly development of the law defining, in practical terms, the meaning of non-discrimination and equal employment opportunity and the nature and scope of remedies available under that law, as well as an employer's obligation to provide a workplace free from discrimination. SHRM has long recognized its special responsibility to support and encourage compliance with fundamental principles of equal employment opportunity in the administration of efficient, workable personnel management systems.

With respect to this case, SHRM's interest — like Congress's interest in imposing caps on damages available to plaintiffs under federal anti-discrimination laws such as Title VII — is to support rules that strike an appropriate and

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No persons or entities other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

judicious balance between, on the one hand, providing enhanced and diverse forms of remedies to legitimate victims of discrimination and, on the other hand, protecting businesses from exposure to potentially devastating liability which may irreparably injure not only the business, but also the employees of the business that rely on its continued viability for their livelihood.

SUMMARY OF ARGUMENT

With the passage of the Civil Rights Act of 1991 (the "1991 Act"), Congress authorized compensatory and punitive damages for intentional discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). At the same time, the statute capped available damages at various levels depending on the size of the employer. The plain statutory language of the 1991 Act, confirmed by its legislative history, reflects this congressional intent to expand the types of remedies available under Title VII, but limit the exposure of businesses — and particularly small businesses. Limiting exposure to such damages was in fact critical to passage of the 1991 Act. As explained below, this congressional intent — plainly reflected in the text of the 1991 Act — is undermined if front pay damages are exempted from this statutory cap.

The texts of both Title VII and the 1991 Act themselves compel the conclusion that front pay damages should be included within the statutory cap on damages. Title VII does not expressly authorize front pay (as it does back pay). The 1991 Act similarly does not mention front pay, but provides for awards of compensatory damages, which include damages for "future pecuniary losses" other than back pay and other relief that was already authorized by Title VII. If the terms "future pecuniary losses" are given their ordinary, contemporary and common meaning, such losses must include damages for future lost earnings, *i.e.*, front pay. As such, front pay falls within the

definition of the types of damages that are subject to the statutory cap (*i.e.*, "future pecuniary losses"), and are not excluded from the caps because front pay was not a remedy specifically authorized by the text of Title VII.

Although many courts have continued to exclude front pay from the damages caps, in *Hudson v. Reno*, 130 F.3d 1193, 1203 (6th Cir. 1997), *cert. denied*, 525 U.S. 822 (1998), the Sixth Circuit Court of Appeals found that front pay damages are included within the caps. The *Hudson* court reasoned that, because front pay — or monetary compensation for future lost earnings — was not expressly authorized by Title VII, it fit squarely within compensatory damages for "future pecuniary losses." The reasoning of the Sixth Circuit reflects the plain meaning of the statutory language crafted by Congress.

Characterizing front pay as an equitable remedy, and not a legal one, because courts have on occasion awarded it in lieu of the equitable remedy of reinstatement, cannot be determinative because Title VII does not specifically authorize front pay, and compensation for future lost earnings has always been, historically, a classic form of monetary relief routinely awarded by juries in diverse types of cases. The fact that courts have used this legal remedy as a substitute for the equitable remedy of reinstatement when that remedy is, as a practical matter, unavailable (and even have referred to it as "equitable" because it is substituted for an equitable remedy), does not change the fundamental nature of the relief, which is legal, or transform it into something other than compensation for "future pecuniary losses" that are subject to the cap on damages in the 1991 Act.

Finally, capping front pay best effectuates the goals of the 1991 Act. It allows legitimate victims of discrimination access to forms of relief such as emotional distress, punitive damages, and compensation for lost future earnings, while at

the same time (by virtue of the statutory caps on those remedies) discourages frivolous, costly litigation, and limits, in a reasonable manner, the exposure of businesses — particularly small businesses — to unbridled damage awards. Exempting front pay from the statutory caps on damages established by the 1991 Act would entirely undermine this statutory goal.

Argument

Point I

Front Pay Is Compensation For Future Pecuniary Loss Subject to The Cap on Compensatory And Punitive Damages Pursuant to 42 U.s.c. § 1981a

A. The Civil Rights Act of 1991 Struck A Balance Between Expanding Remedies for Victims of Discrimination, and Protecting Small Businesses from Exposure to Oppressive Damages Awards

Prior to the passage of the Civil Rights Act of 1991, 42 U.S.C. § 1981a ("the 1991 Act"), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII") only permitted a court, as a remedy for a violation of the statute, to:

> enjoin the respondent from engaging in such unlawful practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay, . . . or any other appropriate equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g)(1). The statute did not provide for monetary relief other than back pay, and did not explicitly authorize an award of front pay or otherwise address compensation for future damages.

In passing the 1991 Act, Congress expressly authorized courts to award pecuniary relief for violations of Title VII in the form of punitive damages for intentional discrimination, and "compensatory damages." 42 U.S.C. § 1981a(a)(1) The 1991 Act did not define "compensatory damages" other than to expressly exclude from such damages "back pay, interest on back pay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964." 42 U.S.C. § 1981a(b)(2). As this Court recognized in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 253 (1994), "the new compensatory damages provision [in] the 1991 Act is 'in addition to,' and does not replace or duplicate the *backpay* remedy allowed under prior law." (emphasis added). In that decision, this Court also recognized that the 1991 Act "significantly expands" the monetary relief available to plaintiffs which before generally "included 'only an amount equal to the wages the employee would have earned from the date of discharge to the date of reinstatement, along with lost fringe benefits . . . ,'" *i.e.* back pay. *Id.* at 253 (citing *United States v. Burke*, 504 U.S. 229, 239 (1992)).

In contrast to the express exclusion of back pay from the definition of "compensatory damages," the 1991 Act does not mention front pay as a form of relief excluded from compensatory damages. The statute easily could have been drafted to include such an exclusion.

Although the 1991 Act significantly expanded the monetary relief available to plaintiffs in Title VII actions, it also established "caps" on that relief, limiting "the amount of compensatory damages for future pecuniary losses . . . and the amount of punitive damages" on a sliding scale based on company size. 42 U.S.C. § 1981a(b)(3). Damages for employers with more than 14 and fewer than 101 employees are capped at $50,000; for employers with more than 101 but fewer than 200 employees, damages are capped at $100,000; for

employers with more than 200 but fewer than 501 employees, the cap is $200,000; and for employers with more than 500 employees, the cap is $300,000. *Id.*

The legislative history of the 1991 Act demonstrates that these caps were included in the legislation as part of a compromise that struck a balance between, on the one hand, significantly expanding the nature and extent of the remedies available to victims of discrimination and, on the other hand, reasonably limiting the exposure of businesses, especially small businesses, to frivolous litigation (encouraged by the availability of new damages), and potentially devastating damage awards. As explained on the floor of the Senate by Senator Dole, "Throughout the negotiations [on the compromise necessary to pass the 1991 Act], the administration had two main objectives," to ensure that employers would not be forced to resort to quotas and "to ensure that *all* damage remedies were reasonably capped. On both counts, the administration has succeeded." 137 Cong. Rec. S 15472 (Oct. 30, 1991) (emphasis added).

Dole further stated that this compromise "makes compensatory and punitive damages available for this first time in cases involving intentional discrimination . . . ," and that, "[t]hese damages are capped, setting an important precedent for tort reform." Moreover, "[w]ith these caps, the incentive for frivolous lawsuits should be significantly reduced." *Id.*

Dole then introduced a section-by-section analysis "representing the views of the administration," and several other Senators, which explains, in pertinent part, that the cap provision "sets an important precedent in tort reform by setting caps on those damages, including pecuniary losses that have not yet occurred. . . ." *Id.* at S15473.

Senators Bumpers and Kasten similarly explained that one of the principal rationales for the cap provision was the

potential effect of large damage awards on businesses, particularly the small businesses that make up the vast majority of employers. *See* 137 Cong. Rec. S15472, at *S15478-80 (explaining how the cap provision was necessary to their support of the bill because it would allow for deterrence of discrimination yet not facilitate entangling small business in endless litigation).

Accordingly, an essential characteristic of the 1991 Act, reflected in its language and supported by its legislative history, is this balance struck between expanding and enhancing available remedies to legitimate victims of discrimination, and limiting, in a reasonable and rational manner, the exposure of modest businesses that could otherwise be subjected to frivolous yet costly litigation, and unlimited exposure to potentially crippling damage awards.

B. The plain meaning of the 1991 Act requires that front pay is included as an element of "future pecuniary losses" subject to the cap on compensatory and punitive damages in 42 U.S.C. § 1981a (b)(3)

It is a "fundamental canon of statutory construction []that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979) (citations omitted); *see also Williams v. Taylor*, 529 U.S. 420, 427 (2000) (absent an indication that Congress intended otherwise, "a statute's words must be given their ordinary, everyday meaning); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning.");

The language of section 1981a, when given its ordinary, contemporary and common meaning, is, as Petitioner claims, "largely dispositive of the question in this case," [Pet. Br. 17],

but compels the opposite result from that asserted by Petitioner. According to Webster's Dictionary, the terms "future," "pecuniary" and "loss" are defined as follows:

> Future - "existing or occurring at a later time"
>
> Pecuniary - "consisting of or measured in money"
>
> Loss - "a person, thing or amount that is lost; a decrease in amount, measurement or degree"

Webster's New Collegiate Dictionary (10th Ed. 1998).

Consistent with the definitions of these common terms, front pay is plainly a form of "future pecuniary loss": it is compensation for an amount that will be "lost" "at a later time," and the amount "consists" of, and is "measured in" money.

Indeed, "front pay" awarded to compensate victims for damages that have not yet accrued at the time of judgment, is generally defined as future lost earnings, simply another way of saying future pecuniary losses. *See United States v.Burke*, 504 U.S. 229, 236 n.9 (1992) (recognizing, in a footnote, that some courts have allowed Title VII plaintiffs to recover "front pay" or future lost earnings); *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 501 (7th Cir. 2000) (affirming jury award of front pay, finding that back pay is similar to lost wages in tort and "front pay is like lost future income"); *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 997 (10th Cir. 1994) ("Front pay refers to the award of money for the future loss of earnings") (citing *Hansard v. Pepsi-Cola Metro. Bottling Co.*, 865 F.2d 1461, 1469 (5th Cir.), *cert. denied,* 493 U.S. 842 (1989); *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 44 (5th Cir. 19920 ("Front pay is awarded to compensate the plaintiff for future lost wages and benefits").

As the Sixth Circuit held in *Hudson v. Reno*, 130 F.3d 1193, 1203 (6th Cir. 1997), *cert. denied,* 525 U.S. 822 (1998), absent any definition specified in the statute, a court's

responsibility is to give the phrase "future pecuniary losses" its "ordinary, contemporary, common meaning" (*citing Perrin* , 444 U.S. at 42). As the *Hudson* court found, front pay, which is a monetary award for future loss of wages or other benefits that the plaintiff would have received, fits squarely within the common, ordinary definition of future pecuniary loss. *Hudson* at 1203 (citing *Shore v. Fed. Express Corp.*, 42 F.3d 373, 377-78 (6th Cir. 1994)). As that court explained, "front pay has always been the heart of 'future pecuniary losses' in discrimination suits." *Hudson at* 1204.

Because it is clear on the face of the 1991 Act that the phrase "future pecuniary losses" — if given its common and ordinary meaning — must include front pay, and "future pecuniary losses" are subject to the caps on damages (and there is no express exclusion of front pay from the cap), this Court need proceed no further in its analysis. The plain text of the statute compels the conclusion that front pay is subject to the statutory caps on damages.

Petitioner's principal argument is that front pay is not subject to the caps on compensatory damages for future pecuniary losses because, prior to the 1991 Act, courts frequently awarded front pay as a remedy in Title VII cases in lieu of reinstatement. [Pet. Br. 17]. According to Petitioner, this necessarily renders front pay equitable in nature, and authorized by Title VII. [Pet. Br. 23]

The flaw in Petitioner's reasoning is that Title VII, prior to the 1991 Act, did not on its face authorize front pay, as it did back pay. Rather, front pay is a judicially recognized remedy that courts fashioned for those circumstances where reinstatement was not a viable equitable remedy. *See, e.g., Hudson,* 130 F.3d at 1201-03 (stating front pay is not "specifically authorized by § 706(g)," but recognizing that although reinstatement is the presumptively favored equitable

remedy, prior to the enactment of the 1991 Act courts awarded front pay as an alternative where reinstatement was not appropriate); *EEOC v. W&O, Inc.*, 213 F.3d 600 (11th Cir. 2000) (finding claimants are presumptively entitled to reinstatement, but that front pay can be awarded when a hostile or otherwise unsuitable environment counsels against reinstatement).

Regardless of whether courts have properly recognized a front pay remedy in those situations where equitable relief, such as reinstatement, is not available as a practical matter (an issue that is not before this Court),[2] recognizing the remedy of front pay does not render that remedy something other than compensation for "future pecuniary losses" as those terms are ordinarily understood. Because (i) the 1991 Act plainly, on its face, caps compensatory damages, which, by definition, explicitly include damages for "future pecuniary losses"; (ii) Title VII has never expressly authorized the legal remedy of compensation for future pecuniary losses such as front pay; and (iii) if the statutory language of the 1991 Act is given its ordinary and customary meaning, then front pay can only be considered a form of "future pecuniary losses," front pay must — as a matter of basic statutory construction — be subject to the statutory caps on damages established in the 1991 Act.

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[2] As explained below, at least one Circuit Court of Appeals has questioned the propriety of awarding front pay under a statute that nowhere mentions the availability of that remedy, but speaks entirely in terms of back pay and equitable remedies. *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 116-17 (7th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991).

C. Front Pay is Not "Equitable Relief" and is Therefore Not Excluded From the Caps on Compensatory Damages

Petitioner uses circular reasoning to reach the conclusion that front pay is equitable relief excluded from the caps on compensatory damages for future pecuniary losses. In short, Petitioner argues that (i) although 706(g) does not expressly authorize front pay, it does authorize equitable relief; (ii) courts have routinely granted front pay in lieu of the equitable remedy of reinstatement; (iii) *ergo* front pay is not compensatory relief, but equitable relief authorized by 706(g), because it has been used as a substitute for an equitable remedy. [Pet. Br. 22-23] This argument is flawed because it rests on the mistaken premise that a legal remedy that a court may substitute for an unavailable equitable one, somehow transforms the legal remedy into an equitable one. It also ignores the established case authority that holds that an award of damages for future lost earnings is a legal remedy.

Like any other form of damages, compensation for future lost earnings or wages, the definition of front pay, is a classic form of legal, not equitable, relief. *See, e.g. Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 501 (7th Cir. 2000) (affirming jury award of front pay in a claim under the Americans with Disabilities Act, finding that front pay is like lost future income, and that "[j]uries routinely determine lost wages and discount future income loss to present value"); *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 982 F. Supp. 786 (W.D. Wash. 1997) (affirming jury award for front pay in state and federal discrimination action), *aff'd, in part, and vacated in part, and remanded*, 212 F.3d 493 (9th Cir. 2000)); *Beesley v. Hartford Fire Ins. Co.*, 723 F. Supp. 635, 647 (N.D. Ala 1989) (finding that it is "disingenuous to call 'front pay' an equitable remedy. . . The loss of future earnings constitutes damages of the kind today regularly and

routinely submitted to a jury for resolution in other kinds of cases.").

Indeed, at the common law, employment contracts often contained provisions for both back pay and front pay. Front pay was considered legal relief, and awarding front pay damages was within the purview of the jury precisely because it was legal in nature. *See, e.g., Hollwedel v. Duffy-Mott Co.*, 238 A.D. 468, 264 N.Y.S. 745 (App. Div.) (measure of damages in wrongful discharge included damages for wages accruing after the breach which plaintiff, in opinion of jury, would have lived to earn), *modified*, 263 N.Y. 95 (1933); *see also Barter v. Columbia Farms Distrib. Inc.*, 912 F. Supp. 16 (D. Mass. 1996) ("reducing jury verdict, but noting that measure of damages included what plaintiff would have earned if he had remained in defendant's employ after breach of plaintiff's employment contract.").

Granting legal relief as a substitute for an equitable remedy that is not available as a practical matter, does not somehow magically change the nature of that legal relief, or render it equitable, simply because it is being awarded in lieu of an unavailable equitable remedy. Rather, judicially crafted *legal* relief is simply being substituted for statutorily provided, but practically unavailable, *equitable* relief. Accordingly, although prior to the 1991 Act, courts fashioned the remedy of front pay in an effort to reconcile the "make whole" objectives of Title VII with the fact that in some cases the equitable remedy of reinstatement may not be available, and labeled the relief "equitable" because it substituted for statutorily prescribed equitable relief, they did so by utilizing a remedy that historically was a legal remedy. In short, using front pay as a substitute for reinstatement does not change its legal nature merely because "it is offered in lieu of an equitable remedy." *See* Lisa von der Mehden, *The Role of the Jury and the Court*

in Assessing Front Pay Awards under The Age Discrimination in Employment Act, 58 U. Chi. L. Rev. 1475, 1490-92 (1991).

Indeed, some courts have questioned whether recognizing the legal remedy of front pay was appropriate, notwithstanding its salutary purposes, precisely because front pay is a legal, and not an equitable, remedy. As Judge Posner, writing for the court, noted in *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 116-17 (7th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991):

> The logic of awarding front pay, if the purpose of Title VII's remedial scheme is indeed to make the plaintiff whole, is undeniable. But the premise can be doubted, as can the propriety, under a statute confined to equitable relief, of an award of what is realistically damages for lost future earnings — a legal rather than an equitable remedy.[3]

In sum, the fact that courts — correctly or incorrectly — have exercised their discretionary powers, prior to the availability of compensatory damages, to award a legal remedy (front pay) when an equitable remedy (reinstatement) was not available, does not transform that remedy into equitable relief. Because only equitable relief that is authorized by Title VII is exempt from the caps on compensatory damages, the legal remedy of front pay is necessarily subject to the caps because it is neither equitable relief, nor relief specifically authorized by the text of Title VII.

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[3] In this respect, Title VII is distinct from the Age Discrimination in Employment Act (the "ADEA"), which allows courts to award such "*legal* or equitable relief as may be appropriate to effectuate the purposes" of that Act. 29 U.S.C. § *626*(b) (emphasis added).

POINT II

CAPPING DAMAGES FOR FRONT PAY EFFECTUATES THE GOALS OF THE 1991 ACT

As explained above, although the goals of the 1991 Act were undoubtedly to expand the types of remedies available under Title VII, both to ensure that victims of intentional discrimination were made whole and to provide adequate deterrence, the statute at the same time reflects in its text an intent to provide some measure of protection to businesses from frivolous lawsuits, as well as from excessive awards. The caps on compensatory and punitive damages were intended by Congress to strike the appropriate balance between these competing interests.[4] Allowing uncapped front pay awards would substantially undermine this statutory intent. Large front pay damages awards would have the same deleterious effect that Congress intended to avoid by capping awards for compensatory and punitive damages.

Front pay is "widely defined as the salary a plaintiff would have received had he or she not been subjected to unlawful discrimination of his employer, subject to the employee's mitigating his or her damages." *Shore v. Fed. Express Corp.*, 42 F.3d 373, 377-78 (6th Cir. 1994). By its nature, front pay is speculative, and the longer the period it covers, the more speculative it is. *McKnight v. Gen. Motors Corp.*, 973 F.2d 1366, 1372 (7th Cir. 1992), *cert. denied*, 507 U.S. 915 (1993); *Burns v. Texas City Refining*, 890 F.2d 747 (5th Cir. 1989). It is also intended to be temporary, to insure

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[4] Despite a detailed examination of the legislative history of the 1991 Act, Petitioner is silent with respect to the legislative history of the cap provision itself, which, as explained above, was undeniably a compromise measure that allowed the bill to pass.

that a person is made whole, and "not to guarantee every claimant who cannot mitigate damages by finding comparable work an annuity [to retirement age]." *Anastascio v. Schering Corp.*, 838 F.2d 701, 709 (3d Cir. 1988).

Despite the fact that front pay is acknowledged by courts to be speculative and only temporary in nature, courts have awarded front pay damages ranging from short periods of time to decades, and awards of front pay for more than ten years are not uncommon. *See, e.g. Padilla v. Metro-North Commuter R.R.*, 92 F.3d 117, 125-26 (2d Cir. 1996) (upholding award of twenty-three years of front pay), *cert. denied*, 520 U.S. 1274 (1997); *Martini v. Fed. Nat'l Mortgage* Ass'n., 178 F.3d. 1336 (D.C. Cir. 1999) (upholding award of twenty years front pay in sexual harassment and retaliation action); *Gotthardt v. Amtrak*, 191 F.3d 1148 (9th Cir. 1999) (upholding front pay award of eleven years in hostile environment and sexual harassment claim); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176 (2d Cir.) (awarding front pay of seventeen years in an age discrimination claim), *cert. denied*, 506 U.S. 826 (1992); *Fortino v. Quasar* Co., 751 F. Supp 1306 (N.D. Ill. 1990) (awarding plaintiffs from eight to eleven years front pay), *rev'd on other grounds*, 950 F.2d 389 (7th Cir. 1991); *Bates v. Bd. of Edu.*, No. 97-394-SLR, 2000 U.S. Dist LEXIS 4873 (D. Del. March 31, 2000) (awarding front pay of twenty years for retaliation claim after rejecting gender and disability discrimination claims).

In many cases, front pay awards significantly dwarf back pay awards and far surpass the caps set for damages. *See, e.g. Martini*, 178 F.3d at 1399 (upholding award of $153,500 in back and $1,894, 000 in front pay plus punitive damages under Title VII); *Kelley v. Airborne Freight* Corp., 140 F.3d 335 (1st Cir.) (upholding an award of $1,000,000 in front pay under the ADEA and allowing the application of a 2.25 multiplier to front pay award under Massachusetts law), *cert denied*, 525 U.S. 933 (1998); *Passantino v. Johnson & Johnson Consumer Products*,

Inc., 982 F. Supp. 786 (W.D. Wash. 1997) (court allowed to stand a jury award of $100,000 in back pay and $2,000,000 in front pay under the 1991 Act), *aff'd, in part, and vacated in part, and remanded*, 212 F.3d 493 (9th Cir. 2000).[5]

These long term, speculative, and substantial awards of front pay, which can far exceed the caps established by Congress in the 1991 Act, undermine the fundamental purpose of the 1991 Act: to strike an appropriate balance between expanding remedies (*i.e.*, compensatory and punitive damages) while at the same time limiting exposure to the type of astronomical damage awards all too familiar in personal injury litigation.[6] What difference does it make to a small or medium sized business to have its exposure to punitive damages and other compensatory damages capped, if at the same time it is exposed to unlimited awards for front pay? Is a small employer, and the employees who rely on the employer for their livelihood, any better protected from potentially devastating damage awards because other compensatory damages for "future pecuniary losses" are capped, but not front pay?

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[5] Courts have also awarded front pay for purposes other than making the plaintiff whole, including the deterrent effect of such damages in an "egregious" case. *Pease v. Alford Photo Indus.*, 667 F. Supp. 1188, 1203 (W.D. Tenn. 1987) (finding that "an award of front pay in this egregious case will aid in ending the sexual harassment" at the company). With the availability of punitive damages, such awards are unnecessary and, in any event, should be subject to the caps mandated by Congress.

[6] As explained in Section I, this congressional intent is plainly reflected in the statutory language in the legislative history.

Indeed, exempting front pay from the caps on damages would encourage an expansion of litigation informed less by perceived violation of law than by the potential availability of uncapped damages — a result plainly contrary to the congressional intent expressed in the 1991 Act. Only by limiting exposure to front pay, by including it within the type of damages subject to the statutory caps established by the 1991 Act, can the purpose of the 1991 Act be realized.[7]

At the same time, interpreting the cap on damages to apply to front pay damages is consistent with the intent of the 1991 Act to expand remedies for victims of discrimination. By virtue of the 1991 Act, these victims now have available to them, in addition to back pay and equitable remedies, an entire new array of remedies that were previously not available (*e.g.*, damages for emotional distress, damage to reputation, punitive damages for especially egregious conduct). These new remedies are available even if front pay (which also remains available) is subject to the caps.

Accordingly, the intent of the 1991 Act to strike a balance between expanding the type of remedies available to victims of discrimination, and limiting in a reasonable and rational manner the exposure of businesses to unbridled damages awards, can only be realized by including front pay

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[7] At least one Court of Appeals has implicitly recognized that front pay and other forms of compensatory and punitive damages made available under the 1991 Act are similar forms of damages, and compensate for the same injuries, therefore making it inappropriate to award front pay when the other damages "more than adequately compensate [the] plaintiff." *Carey v. Mt. Desert Island Hosp.*, 156 F.3d 31, 41 (1st Cir. 1998).

within the same statutory caps on damages as other compensatory and punitive damages.

CONCLUSION

For the foregoing reasons, the decision of the Sixth Circuit Court of Appeals should be affirmed.

Respectfully Submitted,

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